MOTION FILED
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No. 88-630

In The

Supreme Court of the United States

October Term, 1988

STATE OF ALABAMA,

Petitioner,

v.

BENJAMIN F. COX, and
BENNIE J. HAYS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE ALABAMA COURT OF CRIMINAL APPEALS

MOTION AND BRIEF OF THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE AND THE SOUTHERN POVERTY LAW CENTER AS AMICI CURIAE IN SUPPORT OF THE PETITION

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Consent of the Parties

The Southern Christian Leadership Conference and the Southern Poverty Law Center hereby respectfully move for leave to file the attached brief amici curiae. The consent of counsel for the petitioner was requested and granted. The consent of counsel for the respondents was requested but refused.

Interests of the Amici Curiae

The Southern Christian Leadership Conference (SCLC) is a national civil rights organization. Founded in 1957 by Dr. Martin Luther King, Jr., the SCLC organized non-violent resistance throughout the South against legal segregation. In its 31-year history, the SCLC has worked to promote equal opportunity for blacks in employment, housing, education, voting, and other spheres.

The Southern Poverty Law Center is a non-profit organization founded in 1971 to advance the rights of poor people and minorities. Its attorneys have litigated employment discrimination, voting rights, capital punishment, and racial violence cases in both federal and state courts throughout the South as well as in the Supreme Court of the United States. It has brought numerous lawsuits against racist and white-supremacist organizations and individuals. *See, e.g., Person v. Miller*, 854 F.2d 656 (4th Cir. 1988) (assisted U.S. attorney in case in which Klan members convicted of violating court order banning paramilitary activities), *petition for cert. filed*, — U.S.L.W. — (U.S. Nov. 9, 1988) (No. 88-792); *McKinney v. Southern White Knights*, No. C87-565-CAM (N.D.Ga. 1988) (civil verdict against Klan groups and individuals for assaulting civil rights marchers); *Donald v. United Klans of America*, No. 84-0725 (S.D.Ala. 1987) (civil verdict on behalf of family of black man lynched by Klan); *Vietnamese Fishermen's Association v. Knights of the Ku Klux Klan*, 518 F. Supp. 993 (S.D.Tex. 1981) (injunction issued ordering Klan to stop harassing Vietnamese fishermen in Galveston Bay).

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Statement of the Case

Amici adopt the Statement of the Case as set forth by the Petitioner.

Question Presented

Should the rule of *Batson v. Kentucky*, 476 U.S. 79 (1986), be extended to the use of peremptory challenges by defense counsel representing white defendants charged with crimes against black victims?

Reasons for Granting the Writ of Certiorari

I. The use of peremptory challenges by white defendants to exclude black venire members systematically from criminal juries deprives black citizens of equal protection of the laws.

This Court has long recognized that "[d]efendants...do not have the only cognizable legal interest in nondiscriminatory jury selection." *Carter v. Jury Commission*, 396 U.S. 320, 329 (1970). Individual citizens "excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial discrimination." *Id.* As this Court stated in *Batson*, discrimination against blacks in jury selection "constitutes a primary example of the evil the Fourteenth Amendment was designed to cure." *Batson*, 476 U.S. at 85.

The interest of black venire members in not being struck on account of race by defense counsel is similar to the interest recognized by the *Batson* Court in not being so struck by the prosecutor. Nevertheless, the question presented by this case differs from that presented in *Batson* in two significant respects. First, because defense counsel do not have the direct connection to the state that prosecutors have, the existence of state action is not as readily apparent as it was in *Batson*. Second, this case implicates defendants' right to freely exercise their peremptory challenges. Neither of these considerations should prevent the extension of the *Batson* rule.

All actions that are part of the selection of a criminal

jury — whether performed by prosecutor, defense counsel, or judge — are state actions. *Cf. Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980) (finding state action in the acts of retained counsel in a criminal trial because "the State's conduct of a criminal trial itself implicates the State"). It does not matter to a black person turned away from jury service on the basis of his race that he was turned away by the defense attorney, rather than the prosecutor, any more than it mattered to black voters that they were prevented from voting in a Texas primary election by the Democratic party, rather than by the government. *See Smith v. Allwright*, 321 U.S. 649 (1944). In each case, the private actor who is discriminating is attempting to use his special position under state law to exclude black people from an important civic function. When the state permits a defense counsel to become a part of the state's "machinery for choosing" jurors and that counsel uses his prerogatives in a racially discriminatory manner, the state itself "endorses, adopts and enforces the discrimination against Negroes" and thereby denies them equal protection of the laws. *Id.* at 664.

Nor should the fact that extending the *Batson* rule would limit the use of peremptory challenges by the defense dissuade this Court from vindicating the rights of black venire members. This Court has "repeatedly stated that the right of peremptory challenge is not of constitutional magnitude, and may be withheld altogether without impairing the constitutional guarantee of impartial jury and fair trial." *Batson*, 476 U.S. at 108 (Marshall, J., concurring) (citing cases). Extending the rule of *Batson* would fall far short of that drastic but permissible step. The defense would remain free to use peremptory challenges for what should be their rightful purpose of "securing juries which in fact and in the

opinion of the parties are fair and impartial." *Swain v. Alabama*, 380 U.S. 202, 212 (1965). Defense counsel would only be barred from using peremptory challenges for a purpose — racial discrimination — for which they were never intended and should not be permitted.

II. Public confidence in the judicial system is undermined when the very judicial system that is charged with protecting the rights of minorities is infected with racial discrimination.

Racial discrimination is particularly insidious when it strikes at the very judicial system minorities must rely upon to protect them from discrimination. As the *Batson* Court noted, "[d]iscrimination within the judicial system is most pernicious because it is 'a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others.'" *Batson*, 476 U.S. at 87-88 (*quoting Strauder v. West Virginia*, 100 U.S. 303, 308 (1879)). Racially discriminatory use of peremptory challenges by defense counsel is common and, particularly in a case like this one in which the judicial system is charged with protecting black citizens from racially motivated crime, it "undermine[s] public confidence in the fairness of our system of justice." *Id.* at 87.

Amici submit that racially discriminatory peremptory strikes by defense counsel, like similar challenges by prosecutors before *Batson*, are "both common and flagrant." *Id.* at 103 (Marshall, J., concurring). Although amici are not aware of any studies of racial bias in peremptory strikes by

defense counsel, *but cf. id.* (citing evidence of discriminatory use of peremptory strikes by prosecutors), it has been the experience of the Southern Poverty Law Center that defendants charged with racially motivated crimes do in fact use their peremptory challenges in a racially discriminatory manner. In the last three jury trials the Center has litigated involving the Ku Klux Klan, for example, this pattern has been abundantly clear. In *Donald v. United Klans of America,* No. 84-0725-AH (S.D.Ala. 1987), in which the Center represented the mother of a young black man lynched by the Klan, the defendants used all their peremptory challenges to strike blacks, resulting in an all-white jury. In *McKinney v. Southern White Knights,* No. C87-565-CAM (N.D.Ga. 1988), in which the Center represented civil rights marchers who were attacked by Klansmen throwing rocks and bottles, the defendants used all their peremptory challenges against black venire members, resulting in a jury with only one black person on it. And in *Person v. Miller*, 854 F.2d 656 (4th Cir. 1988), *petition for cert. filed,* — U.S.L.W. — (U.S. Nov. 9, 1988) (No. 88-792), a criminal trial of Klan members who engaged in paramilitary activities in which the Center assisted the prosecution, the defendants used all their peremptory challenges against blacks, and only one black juror was left to deliberate with her fellow citizens. In short, in these three cases, every peremptory challenge that defendants *could* use to strike a black person they *did* use to strike a black person.

"[W]hen a white defendant is charged with a crime against a black victim, the black community as a whole has a legitimate interest in participating." *Commonwealth v. Soares*, 387 N.E.2d 499, 517 n.35 (Mass. 1979), *cert. denied*, 444 U.S. 881 (1979). Racially discriminatory

peremptory challenges prevent blacks from participating and invite cynicism about the process on the part of the excluded.

These concerns loom particularly large today because of the recent growth of racially motivated crime and the national concern it has generated. *See* Anti-Defamation League of B'nai B'rith, The Hate Movement Today: A Chronicle of Violence and Disarray 1 (1987) (more criminal violence by racial extremists during the past three years than in the previous two decades); H.R. Rep. No. 575, 100th Cong., 2d Sess. at 10 (1988) (national concern over widely publicized cases including the beating deaths of Michael Griffith in Howard Beach, N.Y. in 1986 and of Loyal Garner in Hemphill, Texas, last Christmas). In 1987, the U.S. Department of Justice prosecuted 16 racial violence cases against 28 defendants, the most cases it has prosecuted in a single year in the past decade. *See* Southern Poverty Law Center, The Ku Klux Klan: A History of Racism and Violence 57 (3d ed. 1988). A far greater number of such cases were prosecuted on the local level. In cases such as these, the criminal justice system is itself on trial. As the *Batson* Court stated, "[i]n view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race." *Batson*, 476 U.S. at 99. Amici respectfully submit that this case would provide this Court with an opportunity to further consider the question of how this goal can best be achieved.

Conclusion

For the foregoing reasons, amici respectfully suggest that the petition for a writ of certiorari be granted.

Respectfully submitted,

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